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No. 74-1542

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNION ELECTRIC COMPANY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A, pp. A-1 to A-26) is reported at 515 F. 2d 206.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. A-27) was entered on March 27, 1975. The petition for a writ of certiorari was filed on June 9, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in reviewing a state implementation plan under Section 110(a)(2) of the Clean Air Act, the Administrator of the Environmental Protection Agency is required to determine whether sources of emissions in the state will be unable, due to economic or technological infeasibility, to comply with the state plan's requirements.

2. Whether direct judicial review under Section 307(b)(1) of the Act may be had of the Administrator's approval of a state implementation plan under Section 110(a)(2) on the ground that economic or technological factors make it impossible for a particular source of emissions to comply with the plan's requirements.

3. Whether, if the Act precludes or does not authorize such judicial review, it unconstitutionally limits the judicial power of the court of appeals or deprives one claiming such impossibility of property without due process.

4. Whether the Administrator's approval of a state implementation plan is invalid if the requirements of the plan are not necessary to attain or maintain national ambient air quality standards issued by the Administrator.

5. Whether the Act requires that a challenge to a state implementation plan based on the claim that a pollutant for which the Administrator has issued a national standard is not a health hazard must be presented first to the Administrator, whose determination is subject to judicial review only in the manner prescribed for promulgation or revision of such national standards.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of Article III of the Constitution are set forth at Pet. 3-4. The relevant portions of the Fifth Amendment to the Constitution and Sections 110(a)(2) and 307(b)(1) of the Clean Air Act, as added, 84 Stat. 1680, 1708, 42 U.S.C. 1857c-5(a)(2) and 1857h-5(b)(1), are set forth in the Appendix, *infra*, pp. 1a-4a.

STATEMENT

Pursuant to Section 110 of the Clean Air Act, as added in 1970, 42 U.S.C. 1857c-5, each state is required to adopt and submit to the Administrator of the Environmental Protection Agency ("E.P.A.") a plan providing for the implementation, maintenance, and enforcement, within the air quality control regions in that state, of the national "primary" and "secondary" ambient air quality standards promulgated by the Administrator. National primary standards are those "requisite to protect the public health," while secondary standards are those "requisite to protect the public welfare." Sections 109(b)(1) and 109(b)(2), 42 U.S.C. 1857c-4(b)(1) and 1857c-4(b)(2). The Administrator must approve or disapprove a state plan within four months of its submission. Section 110(a)(2), 42 U.S.C. 1857c-5(a)(2). If he determines that the plan meets the

requirements of Section 110(a)(2)(A)-(H), 42 U.S.C. 1857c-5(a)(2)(A)-(H), he is required to approve the plan. If he finds the state plan deficient, he must disapprove it and, after giving the state an opportunity to revise the plan, propose and promulgate his own regulations correcting the deficiency. Section 110(c), 42 U.S.C. 1857c-5(c).

On April 30, 1971, the Administrator promulgated national standards, pursuant to Section 109 of the Act, 42 U.S.C. 1857c-4, for sulfur dioxide and five other air pollutants that he found constitute a hazard to public health (36 Fed. Reg. 8186). See 40 C.F.R. Part 50. Petitioner, who operates three coal-burning electric power plants in the St. Louis area that emit sulfur dioxide, did not seek judicial review of the standards, although entitled to do so under Section 307(b)(1) of the Act, 42 U.S.C. 1857h-5(b)(1), by filing a petition for review within thirty days in the United States Court of Appeals for the District of Columbia Circuit.

Pursuant to Section 110(a)(1) of the Act, 42 U.S.C. 1857c-5(a)(1), the State of Missouri thereafter submitted its implementation plan to the Administrator, who, on May 31, 1972, approved the provisions of the plan at issue here. 37 Fed. Reg. 10875, *et seq.* Petitioner did not seek judicial review of the Administrator's approval of the plan, as it was entitled to do under Section 307(b)(1) by filing within thirty days a petition for review in the court of appeals for the appropriate circuit.

Two years later, on May 31, 1974, the Administrator notified petitioner that its plants were violating the sulfur dioxide regulations contained in the approved Missouri implementation plan.

On August 18, 1974, petitioner filed in the court of appeals a petition for review of the Administrator's approval in 1972 of the Missouri plan alleging (1) that it faced various economic and technological difficulties in complying with the sulfur dioxide regulations,[1] (2) that sulfur dioxide in the ambient air should no longer be regarded as a health hazard, and (3) that compliance with the state regulations is not necessary for attainment or maintenance of national air quality standards in the St. Louis metropolitan area. By claiming that all of these grounds arose more than 30 days after the Administrator's approval of the plan, petitioner attempted to invoke the provision of the Act permitting a petition for judicial review of E.P.A.'s approval of an implementation plan to be filed more than thirty days after approval when "based solely on grounds arising after such 30th day." Section 307(b)(1), 42 U.S.C. 1857h-5(b)(1).

The court of appeals granted motions filed by the Administrator and certain intervenors[2] to dismiss

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[1] More specifically, petitioner alleged (see Pet. 4-5; Pet. App. A-4, n. 8) that (1) the oil embargo and other economic factors had resulted in such shortages of and high prices for the necessary low-sulfur coal that requiring its use was against the public interest; (2) that adequate sulfur dioxide removal equipment has not been developed; (3) that such equipment is costly; and (4) that petitioner's purchase of such equipment could not realistically be financed.

[2] The State of Missouri and the Missouri Air Conservation Commission intervened as respondents in the court of appeals.

the petition for review for lack of jurisdiction. The court held that Section 307(b)(1) of the Act authorized it to set aside the Administrator's approval of an implementation plan only on grounds—whether arising before or after thirty days from the approval date—that would have required the Administrator to disapprove the plan, and that the economic and technological claims made by petitioner did not constitute such grounds (Pet. App. A-8 to A-24).

The court also held that it had no jurisdiction over petitioner's claim that the regulations were unnecessary to attain national standards because, in view of the Act's recognition of state authority to adopt requirements more stringent than those needed to attain or maintain national standards, the Administrator could not withhold approval on that basis, and hence the court could not invalidate approval on that ground (Pet. App. A-25 to A-26).

Finally, the court held that petitioner's claim that sulfur dioxide is not the health hazard it was once thought to be was not properly before the court because that was effectively a challenge to the Administrator's promulgation of national standards for sulfur dioxide, which should be presented in the first instance to the Administrator and which, in any event, could be the subject of judicial review under the Act only in the United States Court of Appeals for the District of Columbia Circuit (*id.* at A-24 to A-25). See Section 307(b)(1), 42 U.S.C. 1857h-5(b)(1).

In light of its ruling on jurisdiction, the court of appeals found it unnecessary to determine whether

the factual grounds of petitioner's allegations were well-founded or whether they arose entirely after the thirty-day period (*id.* at A-6 to A-8, A-24).

ARGUMENT

1. The principal question presented in the petition concerns the Administrator's obligation to consider economic and technological difficulties of compliance in determining whether to approve a state implementation plan. This is also the question presented by the E.P.A.'s pending petition in *Environmental Protection Agency* v. *St. Joe Minerals Corp.*, No. 74-1650, petition for a writ of certiorari filed on June 28, 1975. As our petition in that case indicates,[3] in our view this is a question warranting review by this Court in light of the conflicting decisions of the courts of appeals, the conflict between the court of appeals' decision in *St. Joe* with this Court's decision in *Train* v. *Natural Resources Defense Council, Inc.*, No. 73-1742, decided April 16, 1975 (*NRDC*), and the adverse effects of the *St. Joe* ruling on the E.P.A.'s ability to perform properly its statutory responsibilities. There is now a possibility, however, that the decision in *St. Joe* may become moot because of subsequent changes in the Pennsylvania regulations there in issue.[4] Accordingly, we believe it would

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[3] We are serving a copy of our petition in that case on petitioner.

[4] Should *St. Joe* become moot we will of course suggest that the Court grant certiorari so as to summarily vacate the judgment and remand for dismissal as moot.

be appropriate to grant certiorari in this case with respect to the first question presented in the petition.[5]

2. With respect to the remaining questions presented by petitioner, the petition should be denied.

a. Petitioner contends that the Clean Air Act, as construed by the court of appeals to preclude judicial review at this time of petitioner's claims of economic and technological infeasibility, is unconstitutional because it limits the judicial power of the court of appeals in violation of Article III and deprives petitioner of property without due process in violation of the Fifth Amendment.

Petitioner cites no conflict of decisions regarding the first claim, which is in any event without substance. It is well-settled that, in exercising its power under Article III to ordain and establish "inferior Courts" and to vest in them "[t]he judicial Power of the United States," Congress has great latitude in limiting the jurisdiction of those courts and specifying the questions they may adjudicate. See, *e.g.*, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331-332; *Clark* v. *Gabriel*, 393 U.S. 256, 259; *Bob Jones University* v. *Simon*, 416 U.S. 725, 746-748.

While petitioner's due process claim likewise involves no conflict[6] and is insubstantial, it is in any

[5] In our statement of the questions presented (p. 2, *supra*) we have divided petitioner's first question into its two component questions.

[6] The conflict of decisions cited by petitioner (Pet. 8-9) concerns the question whether the Act requires the Administrator to consider claims of economic or technological infeasibility,

event premature. Petitioner asserts that the court of appeals decision "states that these factors may never be judicially considered" (Pet. 6). Although the court did observe that the petitioner's economic and technological assertions were not cognizable on a petition for review of E.P.A.'s approval of an implementation plan and involved "essentially legislative judgments" and "political question[s]" (Pet. App. A-22 to A-23), the court did not hold that such issues, when alleged to deprive a person of property, could never be subject to judicial scrutiny, in a federal (or state) enforcement proceeding or otherwise. That question was not before the court of appeals in this case; any observations the court can be said to have made in that regard would have been *dicta*, which provide no occasion for review at this time.[7]

b. Petitioner's contention that approval of a state implementation plan should be set aside insofar as its requirements are unnecessary to attain or maintain national standards has not been accepted by any court and is at odds with the terms of the Act and this Court's construction of it in *NRDC*, *supra*.

Section 116 of the Act, 42 U.S.C. 1857d-1, specifically recognizes the retained authority of states to

not whether due process requires that the court of appeals entertain such claims in exercising the limited judicial review authorized by Section 307(b)(1) of the Act.

[7] As we noted in our petition in *St. Joe* (Pet. 8, nn. 7, 8), other courts of appeals have said in *dicta* that economic or technological feasibility could be an issue in enforcement proceedings, but that issue is not directly before the Court in *St. Joe* or in this case.

adopt or enforce emissions standards or limitations or other air pollution control requirements, provided only that they not be less stringent than those contained in an applicable implementation plan. And, in *NRDC* this Court noted "the Act's encouragement of the States to adopt plans even stricter than those required to attain national standards." Slip op. 12.

c. Petitioner's final claim is that E.P.A.'s approval of an implementation plan may be challenged on the ground that a pollutant for which E.P.A. has issued a national standard to be attained by the plan should no longer be regarded as a health hazard.

The necessity for a particular national standard is not among the limited grounds on which E.P.A. is authorized under Section 110(a)(2), 42 U.S.C. 1857c-5(a)(2), to disapprove a state plan. See *NRDC*, *supra*. The Act specifies, moreover, a distinct procedure for judicial review of E.P.A.'s actions concerning promulgation of national standards (as distinguished from approval of state implementation plans), under which a petition for review may be filed only in the United States Court of Appeals for the District of Columbia Circuit. Section 307(b)(1), 42 U.S.C. 1857h-5(b)(1). The conclusion of the court below that judicial review of petitioner's claim concerning whether sulfur dioxide is a health hazard could be had only in the District of Columbia Circuit was recently endorsed by that court in *Oljato Chapter* v. *Train*, 515 F.2d 654, where the court specified the procedures to be followed by one challenging

E.P.A.'s adoption of a standard on grounds allegedly arising more than thirty days after its promulgation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted with respect to the first question presented in the petition and denied in all other respects.

Respectfully submitted.

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GERALD P. NORTON,
Assistant to the Solicitor General.

AUGUST 1975.

APPENDIX

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

Section 110(a)(2) of the Clean Air Act, as added, 42 U.S.C. 1857c-5(a)(2), 84 Stat. 1680, provides:

> (2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan, or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—
>
> (A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;
>
> (B) it includes emission limitations, schedules, and timetables for compliance

with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be

correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 1857h-1 of this title, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

Section 307(b)(1) of the Clean Air Act, as added, 84 Stat. 1708, 42 U.S.C. 1857h-5(b)(1), provides:

> (b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 1857c-7 of this title, any standard of performance under

section 1857c-6 of this title, any standard under section 1857f-1 of this title (other than a standard required to be prescribed under section 1857f-1(b)(1) of this title), any determination under section 1857f-1(b)(5) of this title, any control or prohibition under section 1857f-6c of this title or any standard under section 1857f-9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 of this title or section 1857c-6(d) of this title, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.

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